Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MARVIN FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER,

Petitioners,

v.

BREVARD COUNTY, FLORIDA, and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT, ON ITS FACE, THE COUNTY'S ORDINANCE VIOLATES PETITIONERS' RIGHTS OF FREE SPEECH AND EXPRESSION WHERE THE ORDINANCE IS SUCH AN EGREGIOUS EXAMPLE OF VAGUENESS AND SUBSTANTIAL OVERBREADTH THAT EVEN THE COUNTY ATTORNEY WHO DRAFTED THE ORDINANCE AND THE LAW ENFORCEMENT OFFICERS WHO ENFORCED THE ORDINANCE CANNOT EXPLAIN OR DEFINE THE TERMS IN THE ORDINANCE.

II. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND THAT, ON ITS FACE, THE ORDINANCE VIOLATES CONSTITUTIONALLY PROTECTED RIGHTS FOR THE FREE EXERCISE OF RELIGION BY PROHIBITING NUDITY AT PLACES OF WORSHIP, WHILE ALLOWING PUBLIC NUDITY FOR MANY SECULAR PURPOSES, WITHOUT A COMPELLING REASON FOR SUCH UNEQUAL TREATMENT.

III. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO SUBJECT THE ORDINANCE TO STRICT SCRUTINY EVEN THOUGH THE ORDINANCE IS A THINLY DISGUISED CONTENT-BASED LAW THAT REGULATES PROTECTED SPEECH.

IV. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO RULE THAT INADEQUATE — EVEN NONEXISTENT — GROUNDS EXIST TO SUBSTANTIATE THE "FINDINGS" IN THE ORDINANCE.

V. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT THE SHERIFF ARRESTED AND CHILLED PETITIONERS' FOR THEIR PROTECTED EXPRESSION, WHERE EVEN THE SHERIFF ADMITTED THAT PETITIONERS' NUDITY IS EXPRESSIVE CONDUCT.

VI. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND A DENIAL OF EQUAL PROTECTION WHERE THE SHERIFF ENFORCED THE ORDINANCE AGAINST THOSE ENGAGED IN NATURIST PURSUITS AND POLITICAL EXPRESSION WHILE NOT ENFORCING THE ORDINANCE AGAINST THOSE ENGAGED IN COMMERCIAL ADULT ENTERTAINMENT OR AGAINST MAINSTREAM BEACH-GOERS.

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STATEMENT OF JURISDICTION

The final order sought to be reviewed was entered on May 30, 2003. The order denying rehearing was entered on October 30, 2003. (A-46a.) The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Brevard County Ordinance 95-21 (Full text at A-48a).

STATEMENT OF THE CASE

This case involves facial and as-applied Free Expression, Free Exercise, and Equal Protection challenges to a Brevard County ordinance and to the enforcement of that Ordinance by the Brevard County Sheriff. The basis for federal jurisdiction in the court of first instance, which entered summary judgment under Rule 56 Fed. R. Civ. Pro. against Petitioners, is conferred by 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201, 28 U.S.C. § 2202, Rule 57 of the Federal Rules of Civil Procedure, Rule 65 of the Federal Rules of Civil Procedure, and 42 U.S.C. § 1983.

STATEMENT OF NECESSARY FACTS

All Petitioners herein have engaged in political and religious demonstrations, plays and other serious communications with a pro-nudity viewpoint and the content of nudity. (R1-2,3; R1-2,3,13,14; R1-3; R1-4; R1-4, Ex. B; R1-13; R1-13, 14.) On September 7, 1995, the President of Central Florida Naturists (CFN) faxed a letter to the Brevard County Sheriff to explain that CFN members would conduct a series of political/religious demonstrations at Playalinda Beach at the Canaveral National Seashore to protest Brevard

County's anti-nudity ordinance. (R78-Ex. 20,21,30; R78-Ex. 20,21,22; R148-3; R145-6; R146-1-5.) Petitioners Dr. Frandsen, Morris, the Cervasios, and other members of CFN carefully read the Ordinance and researched case law in order to comply with the Ordinance. (R78-Ex. 20,21,22.) Before the demonstration, several people confirmed Petitioners' belief that their nudity was necessary to convey their messages and that it would send a hypocritical, contrary, and/or wrong message to omit the nudity. (R78-Ex. 20,21,22; R145-1; R146-5-13.)

On September 8, 1995, Morris and the Cervasios were arrested while engaged in nude political/religious protest at Playalinda. (R78-Ex. 21,22.) On September 9, 1995, Dr. Frandsen and Morris were arrested under the Ordinance while engaging in similar activities. (R78-Ex. 20,22.)

During the Spring of 1996, CFN invited Petitioner Wyner to write and produce a play about Playalinda. (R1-12,13; R78-Ex. 21.) Wyner wrote her play entitled "Playalinda: The Beach," which contained nude scenes; e.g., historical scenes regarding the aboriginal inhabitants of what is now known as Playalinda. (R78-Ex. 21.) The play was cancelled the night before its planned opening (as was a later, similar play) because of fears of arrest under the Ordinance. (R78-Ex. 21.)

On July 7, 1996, Morris and the Cervasios were again arrested under the Ordinance by Sheriff's deputies while engaged in a political demonstration. (R78-Ex. 21,22.) Subsequently, Morris attempted to organize a nude sit-in for May 23-24, 1998, even obtaining a NPS permit for the sit-in, but the sit-in had to be cancelled because of fear of arrest under the Ordinance. (R78-Ex. 22,33.) To the Deputies

assigned to directly enforce the Ordinance and who arrested Dr. Frandsen, Mr. Cervasio, and Morris, it did not matter whether or not one was engaged in a political demonstration: "If you're nude, you're arrested." (R79-13-17; R81-4-6,9,16; R81-9; R82-31; R81-9-11,13-15,33.)

The Brevard County Commission enacted, and the Sheriff enforces, the Ordinance primarily because Naturist nudity allegedly has a bothersome emotional impact on certain members of the community with contrary religious and political views about the morality and desirability of Naturist recreation and of Naturist communication with the public. (R1-7; R79-21,22; R82-7-9; R82-71, R84-10-13.)

The Findings in Section 3 (and other sections) of the Ordinance consist of dictum and sections lifted from other ordinances without regard to accuracy or applicability, particularly the St. Johns County Ordinance regulating nudity in the context of adult entertainment. (R84-17-19, R1-Ex.A; R84-19,20.) All polls and other scientific data belie the Ordinance's findings, including the finding of adverse secondary effects. (R78-Ex. 4; R84-37,38; R1-Ex. A.) No significant evidence supports the Ordinance's finding of increased complaints about nudity. (R78-Ex.34; R78-Ex. 23; R80-49,50; R80-49,50; R78-Ex. 3; R84-38-40; R84-156,157; R78-Ex. 2.) All incidents of nudity related to anti-social conduct referenced in Incident Reports appear to be subject to prosecution under existing state statutes; e.g., Florida Statute 800.03 and 877.03. (R84-59.)

The Ordinance's claim in § 3(k) that studies from other communities were considered which purport to show numerous social harms accruing from unregulated public nudity is false, as no such studies were ever presented to or considered by the County. (R78-Ex. 36; R84-40.)

Visitor data belies the Ordinance's finding that unregulated Naturist nudity inhibits tourism. (R78-Ex. 35.) No data exist to show that tourism has been or would be substantially lessened due to nudity. The only advertising known to the County is an in-flight airline brochure extolling the nude beach at Playalinda as a desirable tourist destination. (R84-63-66.) No evidence exists that an "influx" of people who create adverse secondary effects are attracted by non-adult entertainment such as Playalinda. (R84-66,67.)

Brevard County makes no specific claim of adverse secondary effects created by citizens exercising Constitutional rights, or appearing nude in public as a part of a larger communication, apart from adult entertainment. (R1-7.) No scientific basis supports a finding that children imbued with conservative values are harmed by nudity. (R84-46-48,92,96; R84-51-54; R84-145,146; R84-50.) The decriminalization of simple public nudity is beneficial to society. (R78-Ex. 1,5.) The invalid findings are not severable because the intent and purpose of the Ordinance are expressly predicated on the facts stated in the Findings. (R1-Ex. A.)

Regarding the operative definitions in Section 4 of the Ordinance, those people presumed to be most knowledgeable about the meaning of the definitions (R78-Ex. 20) had vague, convoluted, vacillating, and contradictory notions of the meanings of many of the words and phrases used therein; e.g., "openly" (R79-5,6,9,13,48,54; R84-75,76); "pubic area" and/or "genitals" (R84-76-82); the underside of a human female breast (R80-4-6,26-28,69; R79-48-51; R84-84-92); "discernably turgid" (R81-43,44; R80-28; R79-52-54; R82-69-71; R84-96-99); "opaque" (R80-29-31; R84-82); "body paint, body dye, a tattoo, latex, or any similar

substances" (R80-31,32; R84-99-105,158-160); a place legitimately set apart for nudity (R84-105-110); and, someone who causes another to become turgid. (R84-111.)

County Attorney Knox, the drafter of the Ordinance, is unclear about the meaning of Exemption A in Section 6 and why it is in the Ordinance at all; and could not give any illustration of nudity that would fall under Exemption A. (R84-6,7; R84-111-115.) Exemption A appears to be so overbroad that it outlaws all nudity associated in any way with money; e.g., a photographer and nude model during a commercial photography session, or a doctor and patient during a paid physical examination. 95-21(6)(A)

Exemption 6(B) — as a whole or in its various parts — is "vague in meaning" (R78-23); e.g., "political demonstration" (R80-10,11,14,15; R82-46-47[1]); and, "necessary for." (R84-117-119.) Sheriff Williams actually admitted that a photograph showed Dr. Frandsen engaging in protected expression while being arrested under the Ordinance by Sheriff's Deputies. (R80-5,6,10-14; R78-Ex. 20,24, R82-5,6,18,19,46,47; R78-Ex.24.) Meanings of terms in Exemption B are unknown, vague, and/or subjective; e.g., "bona fide," "incidental to and necessary for," "genuine," "guise or pretense", "exploitation," and "commercial gain." (R81-35-37; R80-40; R82-64,65; R84-119,120, R84-120-122; R84-122-126.) The County admitted that no guideline exists in the Ordinance for a police officer to know when or how much nudity is necessary for the communication. (R84-144,145.)

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1. The transcript erroneously attributed to Mr. Edwards the word "informed" for this last use of the word "informal."

Regarding Exemption C, the meaning of the term "existing judicial decisions" is unknown, vague, and/or ambiguous. (R80-44-46; R79-23,25-28; R81-38.) The County even admitted that a person of ordinary intelligence might not understand Exemption C. (R84-126-129.)

Finally, if people in adult entertainment establishments "appeared nude with their breast exposed, . . . they would be in violation of the ordinance." (R82-35.) None of the Exemptions in the Ordinance apply to strip clubs or other adult entertainment establishments. (R83-14,15.) If an area was going to be set aside for nudity, "Zoning would not traditionally be used for that purpose. . . . [I]t would probably be done under this ordinance." (R84-44.) Nevertheless, the Ordinance has not been enforced at strip clubs or anywhere else away from Playalinda. (R80-48,62,67; R82-37; R81-15,16; R83-4,6-13; R78-Ex. 20, 23.)

ARGUMENT

I. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT, ON ITS FACE, THE COUNTY'S ORDINANCE VIOLATES PETITIONERS' RIGHTS OF FREE SPEECH AND EXPRESSION WHERE THE ORDINANCE IS SUCH AN EGREGIOUS EXAMPLE OF VAGUENESS AND SUBSTANTIAL OVERBREADTH THAT EVEN THE COUNTY ATTORNEY WHO DRAFTED THE ORDINANCE AND THE LAW ENFORCEMENT OFFICERS WHO ENFORCED THE ORDINANCE CANNOT EXPLAIN OR DEFINE THE TERMS OF THE ORDINANCE.

Even though the undisputed evidence showed that the County Attorney who drafted the Ordinance and the Deputy Sheriffs who enforced the Ordinance were unable to define or explain many key terms of the Ordinance, and even though key terms of the Ordinance are clearly vague, ambiguous, contradictory, and/or overbroad, the lower courts failed to invalidate the Ordinance as required by binding precedent of this Court, especially because the clarity and specificity of a criminal law are at issue. In doing so, not only has the Court of Appeals decision decided an important question of federal law in a way that conflicts with relevant decisions of this Court, the Court of Appeals effectively sanctioned a departure from the accepted and usual course of summary judgment proceedings by a lower court as to call for an exercise of this Court's supervisory power.

More specifically, this Court's precedent requires a holding that the astonishing scope and overbreadth of Exemptions A and B of the Ordinance punish a "substantial" amount of protected free speech, in relation to the Ordinance's plainly legitimate sweep, and serve to invalidate *all* enforcement of the Ordinance, until a limiting construction or partial invalidation so narrows the Ordinance as to remove the threat or deterrence to constitutionally protected expression — especially because the Ordinance imposes criminal sanctions. *See Virginia v. Hicks*, 123 S. Ct. 2191, 2195-99 (2003). Also, the Ordinance is too vague and uncertain to provide meaningful guidance and enforcement because, *inter alia*, the undisputed evidence shows that those who drafted and enforced the Ordinance — as well as reasonable people of ordinary (or greater) intelligence — do not understand large and important portions of the Ordinance. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding inadequate guidelines may permit a standardless sweep allowing police to pursue their personal predilections). Here, the Ordinance authorizes and even encourages arbitrary and discriminatory enforcement because the Ordinance empowers police with unguided discretion to deny the right to speak altogether, as shown by the deputies' unlawful rationales in making the arrests of Petitioners — for example, the statement, "if you're nude, you're arrested." (R82-31.)

Petitioners, who appear to be of ordinary or greater intelligence, have studied and made good-faith efforts to comply with the Exemptions under the Ordinance. The fact

"that [a citizen] was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that [the rule] creates a trap for the wary as well as the unwary." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031 (1991). Here, it seems impossible that the terms of the Ordinance are not vague and ambiguous, and that the Ordinance does not fail to instruct what is prohibited, when the District Court opines that "training" might remedy the misunderstandings of the County Attorney who drafted the Ordinance and of the Sheriff in charge of enforcing the Ordinance. The obvious question is, "If even the drafter doesn't understand, who could train?" Thus, the answer to whether the Ordinance conveys sufficiently definitive warning as to the prescribed conduct when measured by common understanding must be a resounding "No!"

II. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND THAT, ON ITS FACE, THE ORDINANCE VIOLATES CONSTITUTIONALLY PROTECTED RIGHTS FOR THE FREE EXERCISE OF RELIGION BY PROHIBITING NUDITY AT PLACES OF WORSHIP, WHILE ALLOWING PUBLIC NUDITY FOR MANY SECULAR PURPOSES, WITHOUT A COMPELLING REASON FOR SUCH UNEQUAL TREATMENT.

The Ordinance effectively bans several religions from practicing nude rituals, while allowing nudity for recreation and other secular purposes.

> [I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to

> extend that system to cases of 'religious hardship' without compelling reason. [The government's] application of the ordinance's test of necessity devalues religious reasons * * * by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

Without compelling reasons to the contrary, exemptions made for secular reasons must also be made for religious reasons. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999). Here, the ban on nudity in the Ordinance's Section 5 applies to all "public places," which are broadly defined in § 4(e) to include a "meeting facility utilized by a religious . . . or similar organization." The term "meeting facility" is broad and on its face must include private homes where religious services are held as well as facilities owned by religious groups. No Exemptions exist even for religious facilities or religious meetings held in homes. In contrast, the Ordinance unjustifiably allows secular nudity for recreation or other purposes in § 4(d), § 4(d)(1-2), and § 6(a), § 6(d) and § 6(f).

The District Court, as affirmed by the Court of Appeals, appears to predicate the summary judgment on the premise that some Petitioners do not absolutely require nudity as part of their religious practices. However, necessity is of no moment in the constitutional analysis. Like whether nudity is necessary to the message, "conduct implicates the Free Exercise Clause if it is motivated by beliefs which are both sincerely held and religious in nature without regard to

whether it is mandatory." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 171 (3d Cir. 2002) (quotation omitted); *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (holding that requiring a religious practice be mandatory to warrant First Amendment protection finds no basis in binding case law). *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying general First Amendment principles to the ritual slaughter of various animals without reference to the sacrifices being compulsory to the exercise of the religion). Furthermore, in invalidating an ordinance on Free Exercise grounds, this Court stated:

> [B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S., 872, 884 (1990). As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*, quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Id. at 537-38 (some citations omitted). Here, the Ordinance, as reflected by the District Court's Order and the Court of

Appeal's affirmance, singles out Petitioners' nude religious practice for discriminatory treatment because application of a test of necessity devalues religious reasons for nudity by judging them to be of lesser import than nonreligious reasons. Thus, again, the United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

III. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO SUBJECT THE ORDINANCE TO STRICT SCRUTINY EVEN THOUGH THE ORDINANCE IS A THINLY DISGUISED CONTENT-BASED LAW THAT REGULATES PROTECTED SPEECH.

This Court's precedent requires that the Ordinance's restrictions (e.g., that the nudity be necessary for the communication) and the Ordinance's findings (e.g., that nudity must be prohibited because it sends the wrong message) be subjected to strict scrutiny because those restrictions and findings result in a law that directly regulates speech. Government regulation of expressive activity is not "content neutral" if it is justified with reference to the content of regulated speech. *See Hill v. Colorado*, 530 U.S. 703, 720 (2000). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (finding a law content-based because, in part, "the overriding justification for the regulation is concern for the effect of the subject matter on young viewers"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1981) (holding that nudity on a drive-in movie screen visible to passersby could not be suppressed because all the passersby had to do was avert their gaze to avoid the

nudity); *Cohen v. California*, 403 U.S. 15 (1971) (holding that a man walking in a courthouse corridor wearing a jacket displaying the phrase "Fuck The Draft" could not be forced into expressing his views by more socially acceptable means merely because women and children were exposed to the expletive). Here, the Ordinance directly regulates speech because the Ordinance's terms — cunningly couched in the negative and labeled as "Exemptions" — qualify and define the bounds of protected speech in ways that materially misstate and overly restrict the bounds permissible under the First Amendment. The ordinance also confers overbroad censorial powers upon police to subjectively interpret whether speech is "bona fide," "genuine," "incidental to and necessary for," "exploitation," and "commercial gain." As evinced by the testimony of County Attorney Knox (the Ordinance's drafter) and Sheriff Williams, such qualifiers are ordinarily considered and understood only in relation to the content and viewpoint of other examples of expressive nudity; e.g., a bra-burning demonstration, *Hair* and other mainstream plays. Also, the evidence shows that many people in this nation — and in Brevard County in particular — are very much engaged in wearing the least encumbering and most revealing swimsuits possible. The evidence that the Ordinance is not enforced against commercial strippers in g-strings or against mainstream beachgoers in thong bikinis — all of whom are indisputedly nude as defined by the Ordinance — but *is* enforced against those with political views, religious practices, and unadorned lifestyles that are loathed by certain special interest groups vividly demonstrates the clear and practical danger of viewpoint regulation induced by the vague terms of the Ordinance.

Exemption B's requirement that nudity be "necessary for" a communication in order to be considered protected

speech under the Ordinance is patently unconstitutional as a direct — albeit inverse — restriction on protected speech.[2] The law is clear that nudity is afforded First Amendment protection merely when combined with protected speech and where the nudity conveys a message that is likely to be understood by those who view it. *See, e.g., Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (holding also that a message need not even be particularized to be protected). While nudity per se may not be protected conduct under the First Amendment, it is protected as speech when merely combined with some mode of expression which itself is entitled to First Amendment protection. The law is well established by this Court and by the other courts that the government may not prescribe the means, method, or mode — including nudity — by which a communication is delivered. *See Erznoznik*, 422 U.S. at 215. "The mere existence of an alternative means of expression . . . cannot by itself justify a restraint on some particular means that the speaker finds more effective." *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980). *See also Wyner v. Struhs*, 254 F. Supp. 2d 1297 (S.D. Fla. 2003) (holding that people engaging in nude expression at a public beach were protected under the First Amendment); *Tunick v. Safir*, 228 F.3d 135 (2d Cir. 2000) (holding that injunction was proper to prevent police interference with photographer of nudes in public).

The Ordinance's intended effect of regulating speech is also shown by the Ordinance's findings that necessarily implicate communicative elements of nudity. "Where the

2. It is crucial to note that the granting of the Sheriff's Motion for Summary Judgment is predicated entirely on this point because the District Court found that a lack of necessity for the nudity created probable cause for arrests.

designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists." *Playboy Entertainment Group*, 529 U.S. at 813 (finding a law content-based because, in part, "the overriding justification for the regulation is concern for the effect of the subject matter on young viewers"). Here, the Ordinance's Findings and Exemptions regulate only that speech that has the content of expressive nudity, establishing the Ordinance's primary purpose as shielding conservative religious families from messages involving nudity: "[A]ppearing nude . . . often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby. . . ." 95-21(3)(C). (*See, e.g.*, R84-46-48,92-96, Def. Ex. 3 (County Commission Meeting Minutes of 5/4/95 and 5/18/95).) The Ordinance's intent to regulate speech is also implicit in its stated intent not to permit conveyance of a message that might be construed by some people that Brevard County is against conservative "family values" and that might deter people from visiting the Kennedy Space Center. *See* Ord. 95-21(3)(M-N). The Ordinance regulates speech because it forbids people "to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of an opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County. . . ." *Id.* at (3)(Q). Also, the Ordinance regulates speech because it discourages "the influx into Brevard County of persons seeking to observe and/or participate in such nudity." *Id.* (3)(R). The Ordinance is inherently contrary to the constitutional mandate to restrict expressive nudity as little as possible. At the very least, a tension is present in Finding "P" that has fostered

overregulation of protected speech. A similar argument can be made regarding the Ordinance's emphasis on pre-1776 English common law, which did not recognize a right to free speech at all. *See* 95-21(3)(B), 95-21(5)(E). Furthermore, requiring that the nudity be necessary to the communication is a content-based restriction. *See* 95-01(6)(B).

Also, although the Ordinance describes itself as regulating conduct instead of speech and labels some clauses that actually regulate speech as "Exemptions," much of its regulation of speech is worded in the negative and is subject to the same strict scrutiny and burden of proof as if it expressly and forthrightly described itself as a content-based statute that regulates protected speech.

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the permissible subjects for public debate and thereby to control the search for political truth.

City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (citations and quotations omitted). "Clever content-based restrictions are no less offensive than censoring on the basis of content." *Hill*, 530 U.S. at 767 (Kennedy, J., dissenting) (citing *United States v. Eichman*, 496 U.S. 310 (1990)). Here, merely labelling a regulation of speech an "exemption" should not save the Ordinance from the burden of proving its constitutionality where the so-called "exemptions" actually point out the content-based nature of the Ordinance.

Finally, the vague, ambivalent, and circular lip service paid to constitutional rights by the Ordinance's "savings" clauses cannot save the Ordinance. Restrictive and exclusionary provisions are not affected by their "attendant savings clause for constitutionally protected rights because the language of the savings clause is repugnant to the previous exclusionary language." *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000). Also, the Ordinance's clauses regarding the Constitution and judicial decisions are either meaningless axioms or ephemera. Thus, the Ordinance is content-based and should have been analyzed under strict scrutiny. This Court should grant certiorari review in order to apply the proper level of scrutiny to this content-based Ordinance.

IV. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO RULE THAT INADEQUATE — EVEN NONEXISTENT — GROUNDS EXIST TO SUBSTANTIATE THE "FINDINGS" IN THE ORDINANCE.

The Ordinance's "findings" are without adequate evidentiary bases, and such lack of support, combined with myriad public policy considerations, require the invalidation of the Ordinance. Where such fundamental interests as the right to free speech are at issue, the constitution requires more than simply an articulation of some legitimate interest that the County could have had. This Court has not been satisfied merely because the legislators have mimicked another ordinance that has been found constitutional in another context; the government must also show that the articulated concern had more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of

the legislation. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69-73 (1981). *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426 (2002) (discussing how shoddy data and reasoning can undermine regulatory ordinances). Here, importantly, the Ordinance contains language that was never contained in the ordinances at issue in *Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994); and this case presents facts and issues in a very different; i.e., non-adult entertainment; context. The distinctions truly are material, and mandate a very different outcome because Petitioners engaged in communications of a serious educational, artistic, religious, and political nature which do not have adverse secondary effects imputed to the non-core rights of adult entertainment. Thus, the admissions by the County of adoption of findings without regard to their validity or relevance to Brevard County shows that the County Commission did not reasonably rely upon evidence regarding key findings in the Ordinance; that those findings are clearly erroneous, arbitrary and/or wholly unwarranted; and, by the Ordinance's own terms, that the Ordinance is invalid without those essential findings.

V. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT THE SHERIFF ARRESTED AND CHILLED PETITIONERS FOR THEIR PROTECTED EXPRESSION, WHERE EVEN THE SHERIFF ADMITTED THAT PETITIONERS' NUDITY IS EXPRESSIVE CONDUCT.

As even Sheriff Williams admitted, Dr. Frandsen was arrested while engaged in a political demonstration wherein Dr. Frandsen's nudity conveyed a message. Furthermore, it is undisputed that Morris and the Cervasios were arrested while demonstrating in ways materially identical to the way Dr. Frandsen was demonstrating.

Moreover, even if the Ordinance were not content based and subject only to intermediate scrutiny, Appellants should have been exempted from arrest under the Ordinance, and the Court of Appeals should have considered the issue and found the Ordinance unconstitutional as applied. A challenge to a statute on First Amendment grounds requires that where the statute has been applied, the Court then considers whether the statute is unconstitutional as applied. *See City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Here, the Sheriff admitted that Petitioners' nudity should have been afforded First Amendment protection, and the evidence shows that the Sheriff's policy was for deputies to cite and/or arrest every person who refused orders to cover nudity and that any Exemptions for protected nude expression, whether mandated by the Constitution or by Section 6 of the Ordinance, were to be disregarded. Thus, the Court of Appeals should have considered Petitioners' as-

applied challenge, finding that the Sheriff's enforcement of the Ordinance violated the constitutional rights of all Petitioners.

VI. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND A DENIAL OF EQUAL PROTECTION WHERE THE SHERIFF ENFORCED THE ORDINANCE AGAINST THOSE ENGAGED IN NATURIST PURSUITS AND POLITICAL EXPRESSION WHILE NOT ENFORCING THE ORDINANCE AGAINST THOSE ENGAGED IN COMMERCIAL NUDE ENTERTAINMENT OR AGAINST MAINSTREAM BEACH-GOERS.

By enforcing the Ordinance against nude unpaid political/theatrical/religious expressionists such as Petitioners, and by not enforcing the Ordinance against nude commercial adult entertainers, the Sheriff has violated Petitioners' Equal Protection and Free Speech rights. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotations and citation omitted). When the challenged classification involves the exercise of a fundamental constitutional right, the court must examine the classification with strict scrutiny, and the classification must be narrowly tailored to serve a compelling state interest. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). Here, the Sheriff's intentionally unequal enforcement of the Ordinance regarding strip clubs

vis-a-vis naturists is arbitrary, capricious, and without rational basis. Under the Ordinance, where a person who appears nude in a public place, even if such place is provided or set apart for nudity and even if such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, but such person is nude for the purpose of obtaining money or other financial gain for such person or for another person or entity, that person is not exempt under the Ordinance. *See* Ord. 95-21(6)(A). Here, the evidence shows that people in adult entertainment establishments who appeared nude would be in violation of the Ordinance and no Exemptions would apply. Nevertheless, Petitioners were arrested while commercial adult entertainers go nude without arrest. The Ordinance has not been enforced at strip clubs or anywhere else away from Playalinda Beach, including on those beaches where "non-expressive" "nudity" is prevalent; e.g., against mainstream beach-goers wearing thong bikinis that violate the Ordinance; and where those who are not adhering to naturist tenets generally congregate. (R80-48,62,67; R82-37; R81-15,16.)

No "duality" or "scheme" as hypothesized by the District Court either exists or need be constructed. General precepts of Equal Protection and selective enforcement doctrines should provide adequate guidance in determining that the anti-nudity Ordinance of general applicability is not limited or superseded by an earlier ordinance, especially when the two ordinances are readily compatible and no Exemption excuses the applicability of the general law. Also, if an area was going to be set aside for nudity, "Zoning would not traditionally be used for that purpose . . . — it would probably be done under the ordinance." (R84-44.) Besides, the anti-nudity Ordinance is replete with secular Exemptions for

secular venues, making it clear that the County Commission was familiar with granting the Exemptions it wanted and would have made one for adult entertainment had it so desired. Thus, Petitioners' Free Speech and Equal Protection rights have been violated, again because the Court of Appeal's affirmance conflicted with this Court's rulings.

CONCLUSION

Petitioners respectfully request that this Court grant certiorari to consider this case on its merits.

Respectfully submitted,

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